89-695

NO._____

IN THE
SUPREME COURT of the UNITED STATES

OCTOBER TERM 1989

CHARLES F. WISHART, Petitioner,

v.

THE FLORIDA BAR ASSOCIATION, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE FLORIDA SUPREME COURT

October 24, 1989

ROBERT W. MERKLE, ESQUIRE
Florida Bar No. 138183
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Suite 1120
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QUESTIONS PRESENTED

1. May a party to an action who is a lawyer be disciplined for disobeying void orders openly and in good faith?

2. Whether all orders entered with subject matter and personal jurisdiction are clothed with "presumptive validity" when entered in clear violation of state statutory law and rules of procedure codifying due process?

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TO THE FLORIDA SUPREME COURT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner CHARLES F. WISHART respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida entered May 4, 1989.

OPINION BELOW

The opinion of the Supreme Court of Florida appears in the Appendix hereto. The opinions of the Referee for the Florida Bar Association Initial Brief (Petitioner's briefs are too detailed to include herein) also appear in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on May 4, 1989. A timely petition for rehearing was denied on June 28, 1989, and petition for certiorari was filed within 90 days of that date. The jurisdiction of the Supreme Court is invoked under 28 U.S C. Section 1257(a).

CONSTITUTIONAL PROVISIONS

Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said section reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added)

Article I, Declaration of Rights, Section 9. Due process of the Florida Constitution reads as follows:

> No person shall be deprived of life, liberty or property without due process of law, or be twice put in

jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

(emphasis added)

RULES OF CIVIL PROCEDURE

Rule 1.440, Florida Rules of Civil Procedure (1985) reads:

(a) When at Issue. An action is at issue after any motions directed to the last pleading served has been disposed of or, if no such motions are served, 20 days after service of the last pleading. The party entitled to serve motions directed to the last pleading may waive the right to do so by filing a notice for trial at any time after the last pleading is served. The existence of cross-claims among the parties shall not prevent the court from setting the

action for trial on the issues raised by the complaint, answer and any answer to a counterclaim. (emphasis added)

STATUTES

Section 61.131, Notice and opportunity to be heard, Florida Statutes (1983) provides:

> Before a decree is made under this act, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons is outside this state, notice and opportunity to be heard shall be given pursuant to Section 61.1312.
> (emphasis added)

DISCIPLINARY RULES

The following rules are fully set forth in the Florida Supreme Court decision contained in the Appendix hereto:

DR 1-102(A)(4)	DR 7-102(C)(4)
DR 1-102(A)(5)	DR 7-106(C)(4)
DR 7-102(A)(1)	DR 7-106(C)(6)
DR 7-102(A)(3)	DR 7-106(C)(7)
DR 7-102(A)(7)	DR 4-101(D)(A.30)

CITATIONS

Citations to the Appendix attached herein shall be as follows: (A.)

Citations to the Record (consisting of 987 pages) not yet prepared shall be as follows: (R.)

RAISING THE FEDERAL QUESTION

Throughout the disciplinary proceedings below and the proceedings before the Florida Supreme Court, the petitioner raised the defense that due process man-

dates that no attorney acting as a party in an action could be found guilty of violating disciplinary rules relating to disobeying "transparently invalid orders."

Throughout the court proceedings, before disciplinary actions were instituted, the petitioner sought to preserve his due process rights as guaranteed by the Fourteenth Amendment. His election to disobey court orders, which were perceived to be void ab initio, directly occasioned the punitive sanctions depriving him of his livelihood of practicing law for three (3) years. A state bar association cannot deprive an attorney of the right to practice law for refusing to obey void and oppressive court orders which themselves were executed with total disregard for, and in clear contravention of, pertinent Florida Statutes, Rules of Procedure, the

Fourteen Amendment to the Constitution of the United States and Article I, Section 9, of the Florida Constitution.

STATEMENT OF THE CASE

The petitioner, Charles F. Wishart, is an attorney who was admitted to practice to before the Supreme Court of Florida on May 23, 1966. Prior to the order of suspension herein, petitioner had engaged in the practice of law without complaint or disciplinary action.

Petitioner's spouse Bobbie Sue Wishart is the paternal grandmother of Tiffany, a minor child. Tiffany's parents in conjunction with the proceeding for dissolution of marriage, both sought custody of this child. Petitioner and his wife, who then had legal custody of the child, were named as necessary parties to the dissolution proceeding. Petitioner and his

wife sought to retain custody of Tiffany in order to protect the child from abusive and negligent treatment at the hands of the mother.

At the two custody hearings, the petitioner was denied an opportunity to be heard and present witnesses and evidence, yet lost legal custody of Tiffany to Tiffany's mother. (R. 12)

Pursuant to the judge's ruling to change custody, opposing counsel mailed a proposed order to the judge. (A. 77) In response, petitioner wrote to the judge questioning his ruling. (R. 78) The petitioner's objections centered on denial of due process. (R. 80) The judge then wrote that the petitioner had already had two fifteen-minute hearings and appeared with a large number of witnesses. (R. 84) The petitioner responded by letters that

corrected factual errors. (R. 88-89) The petitioner continued to respond to letters sent by the judge and sent copies of all letters to opposing counsel.

In his correspondence, petitioner asserted his understanding of the procedural, substantive, moral and medical issues at stake. Based upon these letters, the judge entered a written order recusing himself after finding that the matter should be tried de novo. (A. 3) (R. 93)

Due to the medical neglect by Tiffany's mother, her illness was misdiagnosed as being chronic. Therefore, otherwise unnecessary surgery was scheduled for December 5, 1983. (R. 203-210)

Thereafter, the petitioner pursued various legal avenues to remove the child from hazard (R. 96-99), including filing a Petition for Writ of Prohibition, which was

denied. (R. 124-129) Fortunately, the surgery was cancelled because the child's mother lacked sufficient funds. (R. 92)

The child's father brought her to the petitioner's home on December 11, 1983. The petitioner maintained custody of the child at the father's request. On December 12, 1983, the mother secured a Temporary Restraining Order from the succeeding judge, ex parte. (R. 127-128) On December 13, 1983, the sheriff presented this Temporary Restraining Order to the petitioner. The petitioner advised that he had lawful custody since the first judge had determined the custody status of Tiffany was property subject to a de novo proceeding. The sheriff refused to serve the Order since it had no official seal. (4. 166-168)

The petitioner immediately telephoned the judge's secretary advising he would

come to court the next day. (R. 168)

Petitioner's wife refused to attend and requested petitioner leave her and the child at a business owned by a family acquaintance. Petitioner understood his wife would immediately remove the child to an undisclosed location. Petitioner attended the hearing and informed the court that his wife had the child, but that her present whereabouts were unknown.[1] The judge jailed the petitioner for indirect civil contempt. (R. 135-196) The following morning, the petitioner advised the court he would deliver Tiffany when he discovered her whereabouts, but only if the court promised to protect the child and grant a hearing. The court agreed and the child was located and presented to the Department

[1] Petitioner's response to the court's inquiry was literally true.

of Health and Rehabilitative Services. (A. 4) (R. 199-200)

A hearing was granted before a new judge who granted temporary primary residency to the petitioner's wife. (R. 200-202) The petitioner and his wife retained custody of Tiffany for one year. At the end of that year a final rehearing was set. The petitioner objected to having the final rehearing since: (1) he would be unable to cross-examine a hospitalized court counselor who had filed a contested report with the court; and, (2) the pleadings were not at issue since Rule 1.440, Fla. R. Civ. Proc. prohibited the beginning of a trial where an outstanding motion to strike a pleading was unresolved. (A. 4) (R. 244-253, 255-260)

The hearing was conducted despite the petitioner's protest and custody was re-

turned to the mother pursuant to the Final Judgment. (R. 211-218) The petitioner's wife received visitation rights. During an authorized visitation, the petitioner noticed that the child was ill again. The petitioner immediately requested a hearing but the trial judge refused to grant a hearing.

The petitioner maintained custody of the child on the grounds that the Order was: (1) not transcribed; (2) not executed; (3) not rendered; and, (4) was void pursuant to the violation of Rule 1.440, Fla. Stat. (1983). (R. 358-359)

The petitioner set a hearing and sought medical attention for the child. Opposing counsel petitioned ex parte for a "Writ of Habeas Corpus" ordering petitioner to surrender the child. (R. 343-352) Upon learning of the attempted service

of the Writ, the petitioner telephoned the judge to advise that he would attend the hearing previously set. (R. 361) The Writ contained no order to show cause nor return. It simply ordered the return of the child without a hearing. (R. 364-368)

Thereafter, the petitioner requested a legal Writ to which he would show cause. The court declined and refused to hear the petitioner until he obeyed the unrendered Final Judgment. (R 371-407)

The petitioner then exhausted his appellate remedies in the State Courts and filed a Civil Rights Action in Federal District Court. (R. 363-367) Thereafter, the petitioner was served with an Order to Show Cause for Contempt, thereby providing him with a hearing; (R. 368) at which, the petitioner was exonerated. (R. 408-429)

The petitioner and his wife appealed the Final Judgment to the Second District Court of Appeal based on a Rule 1.440, Fla. R. Civ. Proc. violation. The Second District Court reversed and remanded on due process grounds. Wishart v. Bates, 487 Fla.2d 342 (Fla. 2d Dist. Ct. App. 1986). (R. 219) Having reversed the Final Judgment, the Wisharts moved for restoration of the temporary primary residency status they enjoyed before the "final hearing." The succeeding trial judges refused to restore the custody rights won under the appeal in Wishart v. Bates, 487 Fla.2d 342 (Fla. 2d Dist. Ct. App. 1986).[2] (R. 201-202)

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[2]A series of appeals followed centering upon visitation rights,with the Wisharts demanding that primary temporary residency be restored. Wishart v. Bates, 531 So.2d 955 (Fla. 1988), cert. denied, -U.S.-, 109 S. Ct. 1633, 104 L. Ed. 2d 149 (1989), on remand, No. 32, 266, -So.2d- (Fla. 2d Dist. Ct. App. Apr. 7, 1989). (A. 5)

The mother filed a complaint with the Florida Bar. The Florida Bar held a probable cause hearing, but denied the petitioner the right to demonstrate that the orders were both void and voided. The Florida Bar found the "presumptive validity" of all judicial orders mandated discipline. (A. 9) The matter was referred to a Referee who also refused to examine the validity of the orders.

The Referee disregarded petitioner's status as a party and specifically found disciplinary violations entailing representation of a client. The Referee suggested disbarment. (A. 24) The Florida Bar appealed and the petitioner cross-appealed.

The Florida Bar argued that the Referee neglected the petitioner's five year personal involvement in protecting his step granddaughter as a mitigating factor.

(A. 9) The petitioner argued that his due process rights were violated and sanctions were not appropriate.

The Florida Supreme Court refused to examine the invalidity of the court orders and the total lack of evidence or law against the petitioner. The Florida Supreme Court then held a three-year suspension was appropriate punishment.

THE QUESTION IS SUBSTANTIAL

The Fourteenth Amendment implications regarding the practice of penalizing citizens who violate and lawyers who counsel clients to violate "transparently invalid" court orders is a novel and substantial question to the United States Supreme Court. There is a substantial split between those states which will examine an order's "transparently invalidity" for attorney discipline and contempt of court

and those states which will not.

In United States v. United Mine Workers of America, 330 U.S. 253, 67 S. Ct. 677, 91 L. Ed. 884 (1946), this Court clarified the law of contempt. In that case, the Court was ruling on the issue of whether a person should be held in contempt for violating a valid order based upon a void law.

Here, the underlying statutes were valid, but the orders were entered in total disregard for the statutes, rules of civil procedure, and established case law.

In United Mine Workers, Justice Murphy, in dissent, stated:

> In understanding the position which the petitioner is presenting before this court, we draw clear lines of distinction between orders which are merely erroneous, orders which are

voidable, and orders which are void on their face. Orders which are merely erroneous, must be obeyed and have the same force and effect upon the party disobeying them as would valid orders. Orders which are voidable are likewise to be given the "presumption of validity" which close valid orders. However, orders which are transparently invalid on their face and are invalid for the reason that they clearly violate due process need not be obeyed. In fact, it has been held by this Court that orders made by a court having no jurisdiction to make them may be disregarded without liability, due process, or contempt. 330 U.S. at 258, 340. (emphasis added)

Courts normally refer to the proposition of subject-matter jurisdiction and personal jurisdiction without discussing a court's power to enter a given decree. Johnson v. McKinnon, 54 Fla. 221, 45 Fla. 23 (1907) held Courts have no power to violate statutes which codify substantial due process rights.

Here, an order transferred custody from the petitioner without permitting the petitioner to be heard and to present evidence. Fla. Stat., Section 61.131 (1983) providesin pertinent port:

> Before a decree is made under this act, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who

has physical custody of the child. (emphasis added)

Other cases, both in Florida and elsewhere, when resting on the concept of "presumptive validity" have cited Maness v. Meyers, 419 U. S. 449, 955 Ct. 584, 42 L. Ed.2d 574 (1975).

In Maness, an attorney was not in contempt for advising his client to assert his Fifth Amendment right in not turning over pornographic magazines. The attorney had no avenue other than an assertion of privilege with the risk of contempt that would have provided assurance of appellate review. The attorney properly performed his duties in good faith.

Neither Maness nor United Mine Workers needed to reach the ultimate conclusion asserted here. However, the Oregon Supreme Court case of In Re Tamblyn 695 P.2d 902

(Or. 1985) held that an attorney's instruction to his client to disobey a void order violated neither the disciplinary rule prohibiting attorneys from advising clients to disregard a ruling of a tribunal nor the statutory proscription against wilfully disobeying a court.

In Tamblyn, a mandatory injunction was ordered in violation of an Oregon statute requiring a bond before granting temporary injunctive relief. After finding the order void, the Oregon Supreme Court considered whether an instruction by a lawyer to a client to disobey a void order violated the disciplinary rules. In deciding this issue they quoted State ex. re. v. La Follette, 100 Or. 1, 7, 196 P. 412 (Or. 1921):

> The opinion contrasted a party's obligation as to a void order.

'Stated broadly, a party cannot be guilty of contempt for disobeying an order which the court had no authority of law to make ***.' 100 Or. at 7, 196 P. 412 (Citations omitted.)

Only one Florida case, Sandstrom v. State, 390 So.2d 448 (Fla. 4th Dist. Ct. App. 1980), has discussed the concept of "transparent invalidity," but has defined it in a very limited sense. Id. at 448.

Although this test has not been applied by the Florida Supreme Court, there is ample authority throughout the United States that a rule concerning contempt of court, and by analogy disciplinary violations for an attorney, should be adopted along those exact lines.

All United States Supreme Court decisions and state supreme court decisions have centered around the definition of

jurisdiction. In Johnson v. McKinnon, 54 Fla. 221, 45 So. 23 (Fla. 1907), the Florida Supreme Court held that jurisdiction is power and a decree entered outside the judicial sphere of action is not merely voidable, but void.

The key point made in the Johnson v. McKinnon decision is that:

> Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its mode of procedure and the extend and character of its judgment. It must act judicially in all things, and cannot then transcend the power conferred by the law. 45 So. 23 at 26.

In Johnson v. McKinnon, there was no statutory authority for entering a deficiency decree in actions to enforce vendors

liens. The trial court entered a decree for a deficiency in violation of the statute. The court concluded that the decree was absolutely void not simply erroneous, irregular, or voidable, and that it was subject to collateral attack. The court further found that the decree was not erroneously made in the exercise of jurisdiction, but was rendered without power, without authority, and without jurisdiction. This Florida Supreme Court case has never been overturned and clearly defines the legal limits of jurisdiction.

In the case at bar, the statute provided that no order or decree can be entered without first giving the person having possession of the child a hearing. Petitioner was denied that right. Therefore, in interpreting his alleged misconduct the Florida Bar Grievance Committee, the Ref-

eree, and the Florida Supreme Court should have at least considered the invalidity of the orders.

The first judge violated Fla. Stat. Section 61.131 and changed custody without a hearing. That judge later recused himself and found that the case should be tried de novo. The petitioner, relying on the invalidity of the order and the finding of the judge, asserted his legal custody of the child.

The alleged "Writ of Habeas Corpus" was completely defective. See, Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed.2d 837 (1963) The function of a Writ of Habeas Corpus is to have a order to show cause why the child should not be produced. The Writ, however, demanded the return of the child without a hearing.

Similarly, Florida law also provides that no case can be heard or tried until the pleadings are at issue Fla. Stat. Section 1.440 (1983). The trial judge conducted a three-day hearing while a Motion to Strike the last pleading was still outstanding. In a contempt hearing the petitioner was exonerated by another trial judge since the "order" was never rendered. Thereafter, the Second District Court of Appeal reversed the then rendered judgment for violating Rule 1.440. Wishart v. Bates, 487 So. 2d 343 (Fla. Dist. Ct. App. 1986). See generally, Esch v. Forester, 127 So. 336 (Fla. 1930); Leeds v. C. C. Chemical Corp, 280 So.2d 718 (Fla. Dist. Ct. App. 1973); Bennett v. Continental Chemicals, Inc., 492 So.2d 724 (Fla. Dist. Ct. App. 1986). The Florida Bar never answered the petitioner's comprehensive

Brief detailing all of the relevant facts, circumstances and law. Therefore, both a careful reading of the concept of jurisdiction and the complete lack of evidence in the record showing that these void orders were violated clearly demonstrates that the petitioner has been wrongfully deprived of his livelihood equal rights and due process.[3]

We are concerned with disobedience to court orders and the potential havoc that would cause. However, where a court, in clear and obvious excess of its power,

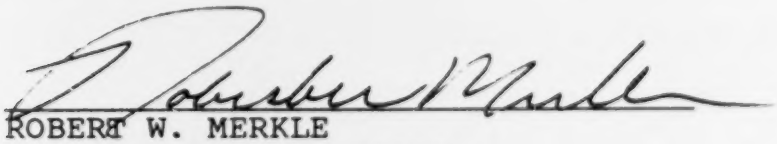
[3]The disciplinary violations alleged bear little relationship to the facts of this case. There was no evidence of violation of established rule of procedure or evidence as provided in DR 7-106(C)(7). There was no evidence of discourteous conduct to a tribunal as provided in DR 7-106(C)(6). In fact, the judges questioned found the petitioner to be courteous. Further, there was no evidence of fraud, delay tactics or harassment, concealing truth and the like.

enters an order violating a party's due process rights, more harm is visited upon our society by having that person punished.

CONCLUSION

WHEREFORE the petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme Court of Florida in The Florida Bar v. Charles F. Wishart. In the event that the Petition is granted, the petitioner prays that the judgment of the Court below be reversed.

Respectfully submitted,



ROBERT W. MERKLE
Florida Bar No. 138183

APPENDIX

THE FLORIDA BAR, Complainant,

v.

CHARLES F. WISHART, Respondent.

No. 70584.

Supreme Court of Florida.

May 4, 1989.

Rehearing Denied June 28, 1989.

Referee issued report finding attorney guilty of professional misconduct during course of custody proceeding involving his step granddaughter. Referee recommended disbarment, and state bar petitioned for review after its Board of Governors voted to appeal recommendation of disbarment and seek three-year suspension rather than disbarment was appropriate sanction to due to attorney's close personal and emotional involvement in custody proceeding.

Suspension ordered.

Barkett, J., dissented and filed opinion.

Attorney and Client

Three-year suspension rather than disbarment was appropriate sanction for attorney who committed disciplinary violations during course of custody proceeding involving his stepgranddaughter; although misconduct involved failing to obey court orders, attorney's close personal and emotional involvement in proceeding was mitigating circumstance.

John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee and Bonnie L. Mahon and David R. Ristoff, Bar Counsel, Tampa, for complainant.

Charles F. Wishart, Brandon, in pro. per.

PER CURIAM.

This disciplinary proceeding is before us for consideration of a referee's report finding professional misconduct. The referee recommends that Wishart be disbarred for committing numerous disciplinary violations during the course of a custody proceeding involving his step-granddaughter. The Florida Bar (Bar) petitioned for review after its Board of Governors (Board) voted to appeal the recommendation of disbarment and seek instead a three-year suspension. wishart cross-petitioned. We have jurisdiction and consider the case pursuant to rule 3-7.6 of the Rules Regulating

The Florida Bar.[1] Art. V, Section

15, Fla. Const. We agree with the Board's recommendation of three years suspension.

---

[1]The complaint and report were based on former Integration Rule and code of Professional Responsibility.

Respondent Charles Wishart is the step-grandfather of Tiffany Bates, who was nine months old when this dispute began. Charles' wife, Bobbie Sue, is the child's paternal grandmother. The Wisharts were named as parties in the dissolution of marriage between Tiffany's parents. At the custody hearing, Wishart was given an opportunity to be heard, but was prevented from presenting witnesses. The court entered a temporary order awarding custody to the mother. Several months later, Wishart sent letters to the trial judge containing information that was beyond the scope of the evidence presented at the prior hearings and potentially damaging to the mother. The judge recused himself on the basis of the letters. The order of recusal, which recommended that the cause be reheard de novo, left unmentioned the

temporary custody order. Wishart took possession of Tiffany and refused to return her to her mother, claiming that the recusal order had the effect of voiding the temporary custody order. A subsequent judge entered a temporary restraining order requiring Wishart to return the child. Wishart refused, claiming that the restraining order was void because it had not been certified and because the underlying custody order was void.

At a hearing on the restraining order, Wishart refused direct orders of the judge to reveal the location of Tiffany and was jailed. The following day, Wishart offered to deliver Tiffany but only if the court promised not to return her to her mother. The court agreed and the child was delivered, placed in the custody of the Department of Health and Rehabilitative Services

for a short while, and then returned to her mother. Wishart actively participated in the final dissolution and custody action which resulted in an order of shared parental responsibility, with primary residence being with the mother. Wishart again gained possession of Tiffany and refused to return her to her mother. He refused to obey a writ of habeas corpus issued by the circuit court that ordered him to surrender the child, claiming the writ was void because it contained no return date and was predicated upon the final judgment which in turn was void because it was rendered while the case was not yet at issue. Wishart appealed the final judgment of dissolution. The district court reversed and remanded so that Wishart could be given an opportunity to present evidence. Wishart v. Bates, 487

So.2d 342 (Fla. 2d DCA 1986). On remand, the trial court dismissed his counterclaim for custody, but granted the Wisharts visitation rights with the child on every other Saturday. The mother appealed and the district court reversed on the visitation rights, ruling that the award of such rights to a non-parent is unjustified. Bates v. Wishart, 512 so.2d 977 (Fla. 2d DCA 1987), quashed in part, 531 So.2d 955 (Fla. 1988). This Court, in turn, quashed the district court decision, pointing out that grandparents can be awarded visitation rights, and remanded the case so that the district court could determine only whether the circuit court abused its discretion in awarding the Wisharts visitation rights. Wishart v. Bates, 531 So.2d 955 (Fla. 1988), cert. denied - U.S. - , 109 S.Ct. 1633, 104 L. Ed.2d 149 (1989) on remand,

No. 32,266, - So.2d - (Fla. 2d DCA apr. 7, 1989).

The Bar filed a complaint charging Wishart with numerous violations, and the referee made findings and recommendations including the following:

12. On numerous occasions (too numerous to count) during the torturous [sic] history of the custody dispute respondent asserted his personal opinions and/or feelings about the justness of court rulings, the truthfulness of witnesses, opposing counsel and reports of court counselors (as he continued to do during this disciplinary proceeding).

13. Throughout the entire time-frame encompassed by the Bar's Complaint respondent deliberately, wilfully and knowingly disobeyed, and counseled others to disobey, orders and judgments of the Circuit court

of the Thirteenth Judicial circuit. Respondent pursued a course of conduct knowingly designed to disrupt the orderly process of the judicial system in order to serve his own ends, as he alone defined them. Whenever confronted with an adverse judicial determination, respondent invented reasons to classify the adverse finding, order, or judgment as "void" thereby permitting him in his own mind to ignore the ruling order, or judgment with impunity. He has yet to recognize, or even acknowledge, the adverse impact this course of conduct had, or will have in the future, on the very system he took an oath to support. His overall defense that he was only motivated by the necessity to protect Tiffany from harm, real or imagined, is rejected in its entirety.

....

I recommend that the respondent be found guilty of the following violations of the Code of Professional Responsibility:

DR 1-102(A)(4)(engage in conduct involving dishonesty, fraud, deceit, or misrepresentation);

DR 1-102(A)(5)(engage in conduct which is prejudicial to the administration of justice);

DR 7-102(A)(1)(file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious

that such action would serve merely to harass or maliciously injure another);

DR 7-102(A)(3)(conceal or knowingly fail to disclose that which he is required by law to reveal);

DR 7-102(A)(7)(counsel or assist his client in conduct that a lawyer knows to be illegal or fraudulent);

DR 7-106(C)(4)(assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matter stated herein);

DR7-106(C)(6)(engage in undignified or discourteous conduct which is degrading to a tribunal); and

DR7-106(C)(7)(intentionally or habitually violate any established rule of procedure or of evidence).

In recommending disbarment, the referee made the following observation:

After a finding of guilt and prior to recommending discipline, pursuant to Integration Rule 11.06(9)(a)(4), and Rule 3-7.5(k)(4), Rules of Discipline, I considered the following personal history and prior disciplinary record of the respondent, to wit:

(1) Age: 52 years old

(2) Date Admitted to Bar: May 23, 1966

(3) Prior Disciplinary Record: None

(4) Mitigating Factors: No prior disciplinary record.

(5) Aggravating Factors: (a) dishonest or selfish motive; (b) a pattern of misconduct; (c) refusal to acknowledge wrongful nature of conduct; (3) substantial experience in the practice of law;...

The Bar petitioned for review to plead the Board's position that a three-year suspension is a more appropriate disci-

pline, and Wishart cross-petitioned. The Bar claims that while disbarment may ordinarily be the proper discipline for such misconduct, Wishart's close personal and emotional involvement in the custody proceeding should have been considered as a mitigating factor sufficient to decrease the degree of discipline to three years suspension. Wishart, on the other hand, raises numerous issues challenging the referee's factual findings and recommendations of guilt.

Wishart essentially contends that he was under no obligation to obey the temporary custody order, the temporary restraining order, the final judgment, or the writ of habeas corpus because all these were void. We disagree. If he doubted the validity of these court documents, his option was to challenge them legally rather than to

ignore them. The documents are presumptively valid and he is obligated to obey them until such time as they are properly and successfully challenged. As to his contentions that he was not given opportunity to be heard, That sending the letters to the judge was proper, that he did not conceal Tiffany's whereabouts, and that his expressions of personal opinion were proper, we agree with the finding of the referee. Accordingly, we adopt the referee's recommendations of guilt.

We agree with the Bar, however, that the referee erred in failing to properly consider Wishart's close personal and emotional involvement in the custody proceeding. The child involved in the proceeding was his step-grandchild and his professed concern was that if she were returned to her mother she would be sub-

jected to needless surgery, prompted solely by the mother's neglect. While Wishart, as an officer of the court, was - or should have been - aware of his obligation to trust in the efficacy of the legal system in resolving this matter, it is clear to this court, as apparently it was to the Bar, that his judgment was impaired by his proximity to the cause. We note that Wishart has been a member of the Bar for over twenty years with no prior disciplinary record and, while his conduct is inexcusable, it does not merit the most severe of discipline, disbarment.

Charles F. Wishart is hereby suspended from the practice of law for three years. He shall have thirty days to close his practice in an orderly fashion and protect the interests of his clients. His suspension shall be effective June 5, 1989. As

provided by rule 3-5.1(h) of the Rules Regulating The Florida Bar, he shall provide notice of his suspension to his present clients and shall accept no new clients until reinstated. Wishart is ordered to pay the cost of this proceeding Judgment is entered against him for $-8,035.18 for which sum let execution issue.

It is so ordered.

EHRLICH, C.J. and OVERTON,, McDONALD, SHAW, GRIMES and KOGAN, JJ., concur.

BARKETT, J., dissents with an opion.

BARKETT, Justice, dissenting.

Short of defrauding a client, I can think of no more flagrant misconduct by an attorney than deliberately disobeying a series of direct orders by the court. This misconduct is not justified, as Wishart contends, by the attorney's belief that these orders were contrary to law. Our

entire system of jurisprudence is built on the principle that disagreements with the application of law can be corrected by appeals, by collateral attacks, or by petition to the legislature for a change in the law. No attorney is ever privileged to arrogate to himself or herself the right to say with finality what the law is. That prerogative inheres in the courts. Without this principle, our legal system would fall into shambles. I agree that emotional involvement could be a mitigating factor in a given case. I do not find it to be in this one. At oral argument, Wishart stated quite plainly that he wilfully disobeyed the direct orders of the court because he believed the judge to be wrong. He indicated that he would engage in this conduct again not only when his grand-daughter was involved by on behalf of

clients as well, if he felt it necessary. Of necessity, an attorney must be required to recognize those instances in which his or her professional judgment is impaired. In the extreme from presented in this case the lack of this capacity itself is a serious indicator of unfitness to practice law.

Moreover, I believe it to be a derogation of our duty to ignore the clear evidence in this record of Mr. Wishart's incompetency. If this court disbars a lawyer for breaking the law in ways that do not affect clients, surely we should do so when we are directly faced with evidence of incompetence that cannot help but work to the detriment of future clients.

For these reasons, I cannot agree with the recommendation of the Board or the majority opinion. I believe that the

referee was correct and Mr. Wishart should be disbarred.

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR
Complainant,

Case No. 70,584
vs. (TFB No. 85-13,803(13C))

Charles F. Wishart,
Respondent
(Formerly 13C85100)

_____/

REPORT OF REFEREE

A. Summary of Proceedings

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Article XI of the Integration Rule of the Florida Bar, and Rule 3-7.5, Rules of Discipline, a final hearing was held on March 10, March 25, April 4, and May 9, 1988. The enclosed pleadings, orders, transcripts, and exhibits are forwarded to the Supreme Court of Florida with this

report, and constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For the Florida Bar: Bonnie L. Mahon and David R. Ristoff

For the Respondent: Pro Se

B. **Findings of Fact as to Each Item Misconduct of Which the Respondent is Charged:**

After considering all the pleadings and evidence before me, I find as follows:

1. In May 1983, respondent became involved in a bitterly contested, and extremely protracted, child custody dispute, both as a named party and as attorney for himself and his wife, Bobbie Sue Wishart, the paternal grandmother of the minor child, Tiffany Michelle Bates. It

is important to understand that respondent is only Tiffany's step-grandfather.

2. On June 1, 1983, Circuit Judge Philip L. Knowles, Thirteenth Judicial Circuit, conducted a hearing to determine, among other things, who should receive temporary custody of then nine month old Tiffany. Contrary to his assertions, at this proceeding respondent was indeed given an opportunity to be heard, although he was not given an opportunity to present witnesses.

3. On June 2, 1983, Judge Knowles entered a Temporary Order awarding the temporary care, custody, control and primary place of residence of Tiffany to her mother, Leslie M. Bates. Respondent unjustifiably refused to recognize the presumptive validity of this order, setting in motion a continuing pattern of conduct

which ultimately gave rise to these disciplinary proceedings. Thereafter, further hearings were held before Judge Knowles on August 3, 1983, and November 4, 1983.

4. On November 18, 22, & 23, 1983, respondent sent letters to Judge knowles, with copies to opposing counsel. Each of these letters contained information which was beyond the scope of the evidence and testimony at the three previous hearings. The letters contained matters which were potentially extremely H Y [sic] detrimental to the other parties to the cause. As a direct result of these materials Judge Knowles very properly, and on his won motion, recused himself. The November 29, 1983, Order of Recusal did not operate to Vacate the Temporary Custody Order dated June 2, 1983, and that order remained as a presumptively valid order.

5. Notwithstanding the June 2, 1983, Temporary Custody Order, on December 10, 1983, respondent and his wife took possession of Tiffany and refused to return her to her mother. Respondent's affirmative defense that the June 2, 1983, Temporary Custody Order was "void" and, therefore, he was justified in refusing to recognize that order, is specifically rejected in its entirety.

6. On December 13, 1983, Circuit Judge Robert W. Rawlins, Jr., entered a Temporary Restraining Order ordering respondent and his wife to return Tiffany to her mother. A Hillsborough County Deputy sheriff went to the respondent's home and attempted to serve the Temporary Restraining Order on respondent. Respondent would not comply with the Temporary Restraining Order because he asserted that it, too, was

"void" because it was not certified, and because he still refused to recognize the presumptive validity of the June 2, 1983, Temporary Custody Order. It does appear to me that the order was indeed certified, however, I specifically find that an attorney, and a party, respondent was ethically and legally required to comply with the December 13, 1983, Temporary Restraining Order by immediately delivering Tiffany to her mother, whether the order was certified or not. His affirmative defenses that his conduct was justified because the December 13, 1983 order was not certified, and the June 2, 1983 order was "void" are specifically rejected in their entirety.

7. On December 13, 14, & 15, 1983, respondent actively participated in a course of conduct deliberately calculated

to conceal Tiffany's whereabouts, to conceal his wife's whereabouts, and to thwart the lawful orders of this Court, in that:

(a) On December 14, 1983, respondent drove himself and his wife to a store owned by his wife's cousin. After his wife departed the automobile respondent drove to the Hillsborough County Court House in order to appear be fore Judge Rawlins in response to the December 13 Temporary Restraining Order. Mrs. Wishart thereafter concealed herself and Tiffany. At two hearings that day before Judge Rawlins, respondent refused direct orders from Judge Rawlins to reveal the whereabouts of Tiffany. He was committed to the Hillsborough county Jail with a condition that he could be released by either revealing the whereabouts of the child or produc-

ing her before the Court. He remained in jail overnight.

(b) On December 15, 1983, respondent again appeared before Judge Rawlins. He again refused to disclose the whereabouts of Tiffany unless the Court agreed not to deliver the child to her mother. Ultimately, respondent contacted his wife and Tiffany was taken into HRS custody. She remained in HRS custody for a short time and was then returned to her mother.

8. Respondent's conduct before Judge Rawlins on December 14 & 15, when viewed as a whole, was part of a continuing pattern of conduct knowingly designed to thwart the lawful orders and processes of the Court. Respondent's testimony that he did not know of Tiffany's whereabouts, or

his wife's whereabouts, was either untrue, deceitful, or both.

9. On December 3 & 4, 1984 a final hearing was held before circuit Judge Manuel Menendez, Jr. Respondent actively participated in that hearing as a party and as an attorney. Thereafter, a Final Judgment was entered wherein shared parental responsibility was ordered with the primary residence of the child being with her mother. Again, respondent refused to recognize the presumptive validity of the Final Judgment because he claimed that the case was not at issue when the final hearing was held.

10. On February 7, 1985, respondent again gained possession of Tiffany and again wrongfully refused to return her to her mother. Respondent's affirmative defense that he was justified in ignoring the Final

Judgment because it was "void" because the case had been forced to trial when not at issue, is specifically rejected in its entirety.

11. On March 1, 1985, a Writ of Habeas Corpus was entered by Circuit Judge donald c. Evans ordering respondent and/or his wife to immediately deliver Tiffany to her mother. Respondent refused to comply with the Writ because he asserted that it, too, was "void" because: (a) there was no return date in the body of the writ: and, (20 the writ wa predicated on the "void" Final Judgment. I Specifically find that the Final Judgment was presumptively valid and that respondent, as an attorney and a party, improperly refused to honor the Writ of Habeas Corpus issued by Judge Evans. Respondent's defense that the writ was "void" because it did not contain a return

date is specifically rejected as constituting an after-the-fact excuse for his unethical and perhaps illegal conduct.

12. On numerous occasions (too numerous to count) during the tortuous history of the custody dispute respondent asserted his personal opinions and/or feelings about the justness of court rulings, the truthfulness of witnesses, opposing counsel and reports of court counselors (as he continued to do during this disciplinary proceedings).

13. Throughout the entire time-frame encompassed by the Bar's complaint respondent deliberately, wilfully and knowingly disobeyed, and counseled others to disobey, orders, and judgments of the Circuit Court of The Thirteenth Judicial Circuit. Respondent pursued a course of conduct knowingly designed to disrupt the orderly process of the judicial system in order to

serve his own ends. as he alone defined them. Whenever confronted with an adverse judicial determination, respondent invented reasons to classify the adverse ruling, order, or judgment as "void" thereby permitting him, in his own mind, to ignore the ruling, order, or judgment with impunity. He has yet to recognize, or even acknowledge, the adverse impact this course of conduct had, or will have in the future, on the very system he took an oath to support. His overall defense that he was only motivated by the necessity to protect Tiffany from harm, real or imagined, is rejected in its entirety.

14. Respondent's attitude toward the law and toward the judicial system generally can be gleaned form an examination of just one of his 185 exhibits, Respondent's 121-A, an amazing 246 page document entitled

"Complaint for Declaratory Judgment, equitable, and other appellate Relief," Charles E. (Sic) Wishart et al v. The Honorable Joseph A. Boyd, Jr., et al, Case No 850603-Civ-T-13, United States District Court, Middle District. I, of course, do not expect the Court to plow through all of the respondent's 185 exhibits (consisting of 1,471 pages) or to reach the 994 page transcript, however, I urge the Court to review Respondent's 121-A in order to fully understand the recommended discipline contained in paragraph D below. This exhibit alone demonstrates respondent's unfitness to continue as a member of the Florida Bar.

C. **Recommendation as to Whether or Not the Respondent should be found Guilty:**

I recommend that the respondent be fund guilty of the following violations of the Code of Professional Responsibility:

DR 1-102(A)(4) (Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation);

DR 1-102(A)(5) (Engage in conduct which is prejudicial to the administration of justice);

DR 7-102(A)(1) (File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another);

DR 7-102(A)(3) (conceal or knowingly fail to disclose that which he is required by

law to reveal); DR 7-102(A)(7) (counsel or assist his client in conduct that a lawyer knows to be illegal or fraudulent); DR 7-106(C)(4) (Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guild or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matter stated herein); DR 7-106(C)(6) (Engage in undignified or discourteous conduct which is degrading to a tribunal); and DR 7-106(C)(7) (Intentionally or habitably violate any established rule of procedure or of evidence.

D. **Recommendation as to Disciplinary Measures to be Applied:**

I recommend that respondent be disbarred.

E. Personal History and Past Disciplinary Record:

After finding of guilt and prior to recommending discipline, pursuant to Integration Rule 11.06(9)(a)(4), and rule 3-7.5(k)(4), rules of discipline, I considered the following personal history and prior disciplinary record of the respondent, to wit:

(1) Age: 52 years old

(2) Date Admitted to Bar: May 23, 1966

(3) Prior disciplinary Record: None

(4) Mitigating Factors: No prior disciplinary record.

(5) Aggravating Factors:

a) dishonest or selfish motive;

b) a pattern of conduct;

c) refusal to acknowledge wrongful nature of conduct;

d) substantial experience in the practice of law; and

e) respondent intentionally violated several court order, a writ of Habeas Corpus and a final Judgment.

F. Statement of Costs and Manner in Which Costs Should be taxed:

I find the following costs were reasonably incurred by the Florida Bar:

1.	Grievance Committee Level	
a)	Administrative Costs	$ 150.00
b)	Court Reporter costs	2,122.00
c)	Staff Investigative Costs	1,068.70
2.	Referee Level	
a)	Administrative Costs	150.00
b)	Court Reporting Costs	4,244.30
c)	Bar counsel expenses	127.38
d)	Referee Expenses	172.80

ESTIMATED COSTS TO DATE: $8,035.18

It is apparent that other costs might be incurred in the future, if further proceedings are necessary in this matter. It is recommended that such future costs, together with the foregoing cost be charged to the respondent and that interest at the statutory rate shall accrue and be payable beginning thirty (30) days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of the Florida Bar.

Dated this 9th day of June 1988.

William A. Norris, Jr.
Referee

copies furnished to:
Charles F. Wishart, Respondent
Bobbie L. Mahon, Assistant Staff Counsel
David R. Ristoff, Branch Staff counsel
John T. Berry, Staff Counsel

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

vs. **Case No. 70,584**
(TFB No 85013,803(13C)
(formerly 13C85100)

CHARLES F. WISHART,
Respondent.

_____/

SUPPLEMENTAL REPORT OF REFEREE

On June 9, 1988, I entered a report of Referee wherein disbarment was the recommended discipline. In support of the recommended discipline the Court's attention was specifically directed to just one of Respondents's exhibits (R-121-A):

"14. Respondent's attitude toward the law and toward the judicial system generally can be gleaned from an examination of just one of his 185 exhibits, Respondent's 121-A, an amazing 246 page document entitled "Complaint for

Declaratory Judgment, Equitable, and other Appropriate Relief," Charles E. Wishart et al v. The Honorable Joseph A. Boyd, Jr., et al, Case No. 85-603-CIV-T-13, United States district Court, Middle District. I, of course, do not expect the Court to plow through all of the respondent's 185 exhibits (consisting of 1,471 pages) or to read the 994 page transcript, however, I urge the Court to review Respondent's 121-A in order to fully understand the recommended discipline contained in paragraph d below. This exhibit alone demonstrates respondent unfitness to continue as a member of The Florida Bar."

On June 20, 1988, respondent filed a 47 page 298 paragraph pleading styled "Motion for Rehearing and Motion of Relief from Judgment," attached hereto as EXHIBIT A.

These motions were each denied on June 22, 1988. an examination of the contents of EXHIBIT A further supports my recommendation that respondent be disbarred.

Dated June 22, 1988.

William A. Norris, Jr.
Referee

copies furnished to:
Charles F. Wishart, Respondent
Bonnie L. mahon, Assistant Staff Counsel
David R. Ristoff, Branch Staff Counsel
John T. Berry, Staff Counsel

IN THE SUPREME COURT OF FLORIDA

CASE No. 70,584

TFB No. 85-13,803(13C)
(formerly 13C85100)

THE FLORIDA BAR,

Petitioner,

vs.

CHARLES F. WHSHART,

Respondent

_____/

THE FLORIDA BAR'S INITIAL BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the appellant, THE FLORIDA BAR, will be referred to as "The Florida Bar" or "The Bar". The appellee, CHARLES F. WISHART, will be referred to as "the respondent". "C" will refer to the Complaint filed in this cause. "TR1" will refer to the transcript of the final hearing held on March 10, 1988. "TR2" will refer to the transcript of the final hearing held on March 25, 1988. "TR3" will refer to the transcript of the final hearing held on April 4, 1988. "TR4" will refer to the transcript of the hearing on May 9, 1988. "RR" will refer to the Report of Referee. "RA" will refer to respondent's Answer, Affirmative Defenses and Motion to Strike Complaint. "R" will refer to the record in this case.

STATEMENT OF FACTS AND OF THE CASE

In May 1983, respondent and his wife, Bobby Sue Wishart, had physical possession of Tiffany Bates. Respondent was the step-grandfather of Tiffany Bates. In May, 1983, respondent and Bobby Sue Wishart were named as parties in the dissolution of marriage between Randall A. Bates and Leslie M. Bates, the parents of Tiffany, based upon the Wisharts' physical possession of Tiffany Bates. (RR, p.1; Respondent's Exhibit #5).

On June 1, 1983, Circuit Judge Phillip L. Knowles conducted a hearing to determine who should receive temporary custody of nine month old Tiffany Bates. Judge Knowles provided the respondent with an opportunity to be heard at the temporary custody hearing; however, Judge Knowles did not provide the respondent with an

opportunity to present witnesses. (RR, p.1; Respondent's Exhibit #1).

On June 2, 1983, Judge Knowles entered a Temporary Order awarding the temporary care, custody, control and primary place of resident of Tiffany Bates, to her mother, Leslie M. Bates. (RR, p.2; Bar's Exhibit #1).

On November 18, 22, and 23, 1983, respondent sent letters to Judge Knowles, with copies to opposing counsel. All of the letters sent to Judge Knowles contained information which was beyond the scope of the evidence and testimony presented at the previous hearings held in the Bates' case. Furthermore, the letters contained matters which were potentially detrimental to the other parties to the cause. (RR, p.2; Bar's Exhibit #2).

On November 29, 1983, Judge Knowles entered an Order of Recusal recusing himself from the Bates' custody case due to the letters sent by the respondent to Judge Knowles. (RR, p.2.; Bar's Exhibit #3; TR1 p. 31, L.9-13). The November 29, 1983, Order of Recusal did not operate to vacate the Temporary Custody Order dated June 2, 1983. (RR, p.2; Bar Exhibit #3; TR1 p. 33, L.6-15; TR1, p. ii, L.10-20; Bar's Exhibit #4).

On December 10, 1983, the respondent and his wife took possession of the minor child, Tiffany, and refused to return her to her mother in violation of the June 2, 1983, Temporary Custody Order. (RR, p.2; Bar's Exhibit #1; TR1, P.90, L.17025, p.91, L. 1-13). The respondent disregarded the Temporary Custody Order dated June 2, 1983, claiming the said Order was "void" due to

Judge Knowles' Recusal Order dated November 29, 1983. (TR3, p. 145, L.206; RA, p.2). On December 13, 1983, Circuit Judge Robert W. Rawlins, Jr., entered a Temporary Restraining Order requiring the respondent and his wife to return the minor child, Tiffany to her mother. (RR, p.1; Bar's Exhibit #5; TR1, p.93, L.18-25, p.94, L.106). A Hillsborough County Deputy Sheriff went to the respondent's home and attempted to serve the Temporary Restraining Order on the respondent. The respondent refused to recognize the validity of the Temporary Restraining Order based on his assertion that it was "void" because the June 2, 1983, Temporary Custody Order was "void". Further, respondent refused to recognize the validity of the Temporary Restraining Order, alleging that it was not certified. (RR, p.2; Bar's

Exhibit #6; and TR3, p. 145, L.206).

On December 13, 14, and 15, 1983, the respondent actively participated in a course of conduct deliberately calculated to conceal Tiffany's whereabouts, to conceal his wife's whereabouts, and to thwart the lawful orders of the Court. (RR, p.3). On December 14, 1983, the respondent drove himself and his wife to a store owned by his wife's cousin. After dropping off his wife, the respondent drove to the Hillsborough County Courthouse to appear before Judge Rawlins in response to the Temporary Restraining Order dated December 13, 1983. Mrs. Wishart concealed herself and Tiffany. (RR, p.3; and TR1 p. 306, L.20-25, p.307, L.1-25, p.308, L.1-4). At the hearing held on December 14, 1983, before Judge Rawlins, the respondent refused direct orders from Judge Rawlins

to reveal the whereabouts of Tiffany. After the respondent refused to reveal the whereabouts of Tiffany, Judge Rawlins committed the respondent to the Hillsborough County Jail with a condition that he could be released by either revealing the whereabouts of the child, or producing her before the Court. (RR, p.3; and TR1, p.308, L.1-12). On December 15, 1983, Judge Rawlins made arrangements for the Hillsborough County Jail to transport the respondent to the Hillsborough County courthouse for a hearing beginning at 10:00 a.m. During the hearing on December 15, 1983, the respondent again refused to disclose the whereabouts of Tiffany unless the Court agreed not to deliver the child to her mother. At the hearing on December 15, 1983, the Court made an agreement with the respondent to turn the child over to

H.R.S. if the respondent would assist the Court and have the child brought to the Court. (RR, p.3; TR1, p.105, L.2-25, p.106, L.1025, p.107, L.1-10; and Bar's Exhibit #9). The respondent then contacted his wife by phone. Thereafter, Mrs. Wishart delivered Tiffany to Judge Rawlins for placement with H.R.S. (RR, p.3; and TR1, p. 107, L.11-25, p. 108, L.1-7). The minor child, Tiffany, remained in the custody of H.R.S. for a short time, and was then returned to her mother. (RR, p.3).

On December 3, and 4, 1984, a final hearing on the Bates' dissolution of marriage and child custody action was held before the Honorable Manuel Menendez, Jr., Circuit Judge. The respondent actively participated in the final hearing as a party and as an attorney. (RR, p.4). In the Final Judgment, shared parental

responsibility was ordered, with primary residence of the child, Tiffany, being with her mother, Leslie Bates. (RR, p.4; Bar's Exhibit #13; and TR4, p.152, L.25, p.153, L.1-15). The respondent refused to recognized the presumptive validity of the Final Judgment based on his assertion that the case was not at issue when the final hearing was held. (RR, p.4).

On February 7, 1985, the respondent obtained possession of Tiffany, and wrongfully refused to return the child to her mother. (RR, p.4; and TR4, p.153, L.21-25, p.154, L.1-8).

On March 1, 1985, a Writ of Habeas Corpus was entered by Circuit Judge Donald C. Evans, ordering the respondent and/or his wife to immediately deliver the minor child, Tiffany, to her mother. (RR, p.4; and Bar's Exhibit #14). The respondent

refused to comply with the Writ of Habeas Corpus based on his assertion that it was "void" because:

(1) there was no return date in the body of the Writ; and
(2) the Writ was predicated on the "void" Final Judgment. (RR, p.4).

The respondent appealed the Final Judgment of Dissolution of Marriage in the Bates' case. On April 2, 1986, the Second District Court of Appeals issued an opinion reversing and remanding for further proceedings based on a finding that the Wisharts should have been afforded an opportunity to be heard and present evidence at the final hearing held December 3 and 4, 1984. (Bar's Exhibit #21). On remand, another final hearing on the Bates' custody matter was held before the Honorable Vernon Evans, Circuit Judge. On December 17, 1987, Judge Evans entered an Order granting a Motion for Involuntary

Dismissal of the Wisharts Counter-Claim for Custody of Tiffany Bates. The aforementioned Order was entered by Judge Evans based upon the fact that the Wisharts failed to establish their claim for custody of the natural mother's child. (Bar's Exhibit #23; and TR1, p.177, L.23-25, p.178, L. 1-16, p.181, L.25, p.182, L.1-24).

The Florida Bar filed a Complaint in this case charging the respondent with violating the following Disciplinary Rules of the Code of Professional Responsibility: DR 1-102(A) (4) (engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); DR 1-102(A) (5) (engage in conduct that is prejudicial to the administration of justice); DR 7-102(A) (1) (file a suit, assert a position, conduct a defense, delay a trial, or take other

action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another); DR 70102(A) (3) (conceal or knowingly fail to disclose that which he is required by law to reveal); DR 7-102(A) (7) (counsel or assist his client in conduct that a lawyer knows to be illegal or fraudulent); DR 7-106(C) (4) (assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matter stated herein); DR 7-106(C) (6) (engage in undignified or discourteous conduct which is degrading to a tribunal); and DR 70106(C) (7) (intentionally or

habitually violate any established rule of procedure or of evidence). (C, p.4).

A final hearing in this cause was held before the Honorable William A. Norris, Jr., Referee, On March 10, March 25, and April 4, 1988. On April 21, 1988, Judge Norris issued a preliminary ruling concluding that The Bar had proved each of the allegations in its Amended complaint, thereby establishing violations of each of the disciplinary rules enumerated above. Subsequently, on May 9, 1988, a hearing was held regarding the appropriate discipline for the respondent's misconduct. At the May 9, 1988, hearing, was held regarding the appropriate discipline for the respondent's misconduct. At the May 9, 1988, hearing, Bar Counsel, with the approval of the Designated Reviewer, recommended that the respondent be

disbarred from the practice of law for his misconduct.

On June 9, 1988, the referee issued his Report recommending that the respondent be disbarred from the practice of law. In addition, the referee recommended that the respondent be responsible for The Florida Bar's costs in the disciplinary proceedings. In recommending that the respondent be disbarred from the practice of law, the referee found as follows:

> On numerous occasions (too numerous to count) during the torturous history of the custody dispute, respondent asserted his personal opinions and/or feelings about the justness of court rulings, the truthfulness of witnesses, opposing counsel and reports of court counselors (as he continued to do during this disciplinary proceeding).
>
> Throughout the entire time-frame encompassed by the Bar's Complaint, respondent deliberately, willfully and knowingly disobeyed, and counseled others to disobey, orders and judgments of the Circuit Court of the Thirteenth Judicial Circuit. Respondent pursed a course of conduct knowingly designed to disrupt the orderly process of the judicial system in

order to serve his own ends, as he alone defined them. Whenever confronted with an adverse judicial determination, respondent invented reasons to classify the adverse ruling, order, or judgment as "void" thereby permitting him, in his own mind, to ignore the ruling, order, or judgment with impunity. He has yet to recognize, or even acknowledge, the adverse impact this course of conduct had, or will have in the future, on the very system he took an oath to support. His overall defense that he was only motivated by the necessity to protect Tiffany from harm, real or imagined, is rejected in its entirety.

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On December 29, 1988, The Florida Bar's Board of Governors reviewed the Report of Referee in this cause and voted to appeal the referee's recommended discipline of disbarment. The Board recommends that a three (3) year suspension is more appropriate in light of respondent's personal and emotional involvement in the Bates' custody matter.

SUMMARY OF ARGUMENT

The referee in this case recommended that the respondent be disbarred from the practice of law for violating numerous Court Orders and for displaying inappropriate conduct during the course of the Bates' Dissolution of Marriage action.

It is the Florida Bar Board of Governors recommendation that the appropriate discipline for respondent's misconduct is a three (3) year suspension rather than disbarment in light of respondent's personal and emotional involvement in the Bates' case.

ARGUMENT

WHETHER THE REFEREE'S RECOMMENDATION OF DISBARMENT FOR RESPONDENT'S REFUSAL TO OBEY COURT ORDERS SHOULD BE REDUCED TO A THREE (3) YEAR SUSPENSION IN LIGHT OF RESPONDENT'S PERSONAL AND EMOTIONAL INVOLVEMENT?

The respondent and his wife, Bobbie Sue Wishart, were made parties to a Dissolution of Marriage action between Randall A. Bates and Leslie M. Bates' infant, Tiffany.

The respondent acted as the attorney for himself and his wife in the Bates' action in an effort to obtain the legal custody of his step-granddaughter, Tiffany.

During the course of the Bates' proceedings, the respondent violated and counseled others to disobey a Temporary Custody Order dated June 2, 1983; a Temporary Restraining Order dated December

13, 1983; oral orders of Circuit Judge Robert w. Rawlins, Jr., on December 14 and 15, 1983; a Final Judgment of Dissolution of Marriage dated February 26, 1985, nunc pro tunc, December 4, 1984,; and Writ of Habeas Corpus dated March 1, 1985. In addition, respondent corresponded with the Court wherein he asserted his personal opinions and provided information beyond the scope of the testimony and evidence presented during the hearings on the Bates' case. Furthermore, during the Bates proceedings, the respondent pursued a course of conduct knowingly designed to disrupt the orderly proceedings of the judicial system in order to serve his own ends.

After the final hearing in this case, the referee recommended that the respondent be disbarred from the practice of law.

The Florida Bar's Board of Governors reviewed the Report of Referee in this cause and voted to appeal the referees recommended discipline of disbarment, and seek a three (3) year suspension based upon respondents personal and emotional involvement in the Bates case.

The Florida Standards for Imposing Lawyer Sanctions provides that disbarment is the appropriate discipline for the Respondents misconduct. Standard 6.11(b) states that disbarment is appropriate when a lawyer improperly withholds material information and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding. Standard 6.21 states that disbarment is appropriate when a lawyer knowingly violates a court order of rule with the intent to obtain a benefit

for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.

Under each of the aforementioned sections, aggravating and mitigating factors can be considered to increase or decrease the degree of discipline to be imposed against an attorney for misconduct.

The referee found the following aggravating factors present in this case; a) dishonest or selfish motive; b) a pattern of misconduct; c) refusal to acknowledge wrongful nature of conduct; d) substantial experience in the practice of law and; e) respondent intentionally violated several Court orders, a Writ of Habeas Corpus and a final judgment. In addition, the referee found as a mitigating

factor that the respondent did not have a prior disciplinary record. (RR, p.6,7).

It is the position of The Florida Bar Board of Governors that the respondent's personal and emotional involvement in the Bates' dissolution case should have been considered as mitigating factor sufficient to decrease the degree of discipline in this case from disbarment to a three (3) year suspension. The child to whom the Court orders applied was respondent's step-grandchild. Respondent has insisted throughout the proceedings that his step-granddaughter would be subjected to neglect if returned to her mother.

CONCLUSION

It is the recommendation of The Florida Bar Board of Governors that the respondent's personal and emotional involvement in the Bates Dissolution of Marriage action be deemed sufficient mitigation to decrease the degree of discipline to be imposed in this case from disbarment to a three (3) year suspension.

WHEREFORE, The Florida Bar respectively requests this Honorable Court disapprove the referee's recommended discipline of disbarment and suspend the respondent from the practice of law for three (3) years.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of The Florida Bar's Initial Brief has been furnished by Certified Mail No. P 827-885-959 to Charles F. Wishart, respondent at his record bar address of 410 West Bloomingdale, Brandon, Florida, 33511-7402, and John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, on this 9th day of September, 1988.

BONNIE L. MAHON